IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

DANE MARCUS BONNER,

Plaintiff,

v.

ST. CROIX COUNTY ADMINISTRATION,

Defendant.

OPINION AND ORDER

03-C-662-C

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In this civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Dane Marcus Bonner argues that defendant St. Croix County Administration violated his rights under the Eighth Amendment when it provided him with Nair to remove hair from his face. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. Defendant contends that plaintiff failed to exhaust his administrative remedies with respect to his claim that defendant caused plaintiff injury when it provided him with Nair. In the alternative, defendant argues plaintiff has not come forward with any evidence that plaintiff's use of Nair exposed him to a substantial risk of serious harm or that defendant acted with deliberate indifference. Because defendant has not submitted any evidence to support its claim that

plaintiff failed to exhaust his administrative remedies, I cannot determine whether defendant is correct. Its motion to dismiss will be denied on this ground. However, because plaintiff failed to put in any evidence to show that the use of Nair on his face caused him a sufficiently serious injury so as to satisfy the objective component of the Eighth Amendment test, he cannot succeed on his claim. Even if plaintiff had made such a showing, no reasonable jury could infer that defendant was deliberately indifferent to plaintiff's risk of serious harm, because defendant had given Nair to other inmates who had used it for successfully removing facial hair and because defendant warned inmates who chose to use Nair for that purpose that there was a risk of harm. For these reasons, I will grant defendant's motion for summary judgment.

As an initial matter, I note that both parties failed to follow this court's Procedure to be Followed on Motions for Summary Judgment, a copy of which was attached to the February 10, 2004 preliminary pretrial conference order, dkt. #8. For example, defendant failed to propose as facts the nature and operation of its grievance procedure and, instead, discussed the procedure in its reply brief. Rule I(B)(4) of this court's procedure states that the "court will not consider facts contained only in a brief." Also, plaintiff failed to follow Rule II(E)(1) and (2), which require persons proposing facts to support those facts with admissible evidence. Admissible evidence includes depositions, answers to interrogatories, admissions, affidavits and documentary evidence shown to be true and correct. Rule I(C)(1).

In response to defendant's proposed findings of fact, plaintiff attempts to dispute a number of facts, such as ¶¶ 5, 13, 15, 27, 28, 57 and 64, but he fails to cite admissible evidence to support his version of the fact. (Although plaintiff attached exhibits to his brief that he characterizes as documentary evidence, plaintiff failed to refer the court to this evidence as supporting his factual responses to defendant's proposed findings of fact. Under Rule I(B)(4), "[t]he court will not consider facts contained only in a brief.") Even if plaintiff had cited admissible evidence to support his facts, my decision would remain the same as plaintiff failed to adduce any evidence, admissible or otherwise, that defendant subjected him to a sufficiently serious injury.

From the parties' proposed findings of fact that comply with the court's procedure and from the record, I find the following facts to be material and undisputed.

## UNDISPUTED FACTS

Plaintiff Dane Marcus Bonner was incarcerated in the St. Croix County jail from August 3, 2003 through September 8, 2003 and from September 20, 2003 through February 20, 2004. He was incarcerated in the Dunn County jail from September 9, 2003 through September 19, 2003. Captain Karen M. Humphrey is Administrator of the St. Croix County jail and has held that position during all times relevant to this action.

Defendant's policy regarding razors is printed in the 2003 Inmate Handbook, which

is given to all inmates, including plaintiff. The policy prohibits jail staff from providing inmates with razors except those inmates who are about to attend a jury trial. All other inmates are provided with Magic Shave and Nair on Sundays, Tuesdays and Thursdays before 10:00 a.m., with the provision that "Magic Shave and/or Nair ARE NOT to be used on your head . . . Magic Shave or Nair are used at your own risk." Beard trimmers are available to inmates once every four to six weeks with the provision that "the beard trimmers are not to be used to shave your head."

The purpose of defendant's policy against providing razors to inmates is to provide a safe and secure environment to all inmates. On April 4, 1999, defendant began to allow inmates to use Nair to remove facial hair because jail staff had found that male inmates had used Nair to remove facial hair in the past with success. In addition to Nair, defendant allowed inmates to use "Magic Shave," with the provision that it was to be used by inmates at their own risk. This change was communicated to all jail staff in an Incident Report of Deputy Barbara J. Schrank dated April 5, 1999, and in a note from Captain Humphrey dated April 5, 1999. Humphrey instructed jail staff to remind inmates each time an inmate asked to use Nair that the product was not intended for use on the face and that if inmates chose to use it for that purpose, they would be responsible for the consequences. On August 10, 2003, plaintiff used Nair on his face. Plaintiff never requested a grievance form from Humphrey regarding an injury to his face from Nair.

Plaintiff had seven physician visits and 19 nurse visits in the St. Croix County jail during the period of his incarceration. At no time did plaintiff complain to the physicians or nurses he saw on those visits about an injury to his face from Nair.

On August 11, 2003, one day after plaintiff used Nair, he spoke to Deputy Janette Bonkoski twice regarding his request to use the law library. Bonkoski was able to clearly observe plaintiff's face during these conversations and did not observe any skin peeling, bleeding, scabbing, burns or scarring on plaintiff's face. Plaintiff did not request a grievance form from Bonkoski regarding an injury to his face from Nair.

Four days after plaintiff used Nair on his face, plaintiff told Deputy Rachel Ingalls about an injury to his hand from playing basketball. During the ten-minute period of time that Ingalls met with plaintiff about the injury, plaintiff said nothing about an injury to his face from Nair and did not request a grievance form from her regarding an injury to his face from Nair. Eight days after plaintiff used Nair on his face, nurse Laura Kennett saw plaintiff in response to his inmate sick call request dated August 16, 2003. At that time, plaintiff asked to discontinue certain prescription medication and complained of arthritic knee pain and constipation. At no time during the visit did plaintiff complain to Kennett of irritation or injury to his face from Nair. During the visit, Kennett observed no peeled skin, bleeding, scabbing, burns or scarring or injury of any type to plaintiff's face.

When plaintiff was transferred back to the St. Croix County jail on September 20,

2003, after a period of incarceration in the Dunn County jail, his health transfer summary form and screening form reported no medical concerns about the condition of his skin or injury to his face from Nair. The screening form has a specific question about whether the inmate's skin is in poor condition and whether the inmate is sick or injured in any way. Plaintiff's form did not indicate that his skin was in poor condition but noted that he had a knee injury from a slip in the shower and that he had high blood pressure.

## OPINION

Defendant argues that the court should grant summary judgment in its favor because plaintiff failed to exhaust his administrative remedies. In the alternative, defendant contends that plaintiff has failed to put in evidence to show that he was exposed to a substantial risk of serious harm or that defendant was deliberately indifferent to that risk in violation of the Eighth Amendment. In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 ( 7th Cir. 1999), the court held that when a defendant asserts the affirmative defense of failure to exhaust administrative remedies, a district court must first consider that defense before addressing the merits of the case. Therefore, I will resolve defendant's failure to exhaust argument before turning to plaintiff's Eighth Amendment claim.

### A. Failure to Exhaust

The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez, 182 F.3d at 535 (emphasis added); see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). Also, the court of appeals has held that to exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002) ("unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred"). "The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Nevertheless, failure to exhaust administrative remedies is an affirmative defense and defendant has the burden o f pleading and proving the defense. Massey, 196 F.3d at 735. Although defendant contends that plaintiff failed to use the St. Croix County jail grievance procedure with regard to the alleged Nair incident, it has submitted no evidence to prove that the St. Croix County jail has a grievance procedure and if so, how it operates. Instead, defendant outlines its grievance procedure in its reply brief. As noted earlier, each party received a copy of this court's Procedure to be Followed on Motions for Summary Judgment as an attachment to the February 10, 2004 preliminary pretrial conference order, dkt. #8.

Rule I(B)(4) of that procedure states that the "court will not consider facts contained only in a brief." The only facts defendant proposes relating to the question of exhaustion are that plaintiff never verbally complained or requested a grievance form from certain jail staff about the Nair incident. Standing alone, these facts do not support a conclusion that plaintiff failed to exhaust his administrative remedies. Defendant's motion for summary judgment on this ground will be denied.

B. Eighth Amendment

Plaintiff argues that he was subjected to cruel and unusual conditions of confinement in violation of the Eighth Amendment when defendant gave him Nair, rather than a razor, to remove his facial hair. The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346.

In order to succeed on his claim under the Eighth Amendment, plaintiff must satisfy a test that involves both an objective and subjective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). First, he must show with admissible evidence that the conditions to

which he was subjected were "sufficiently serious" (objective component) and that defendants were deliberately indifferent to his health or safety (subjective component). Id. Conditions that deprive prisoners of the "minimal civilized measure of life's necessities" satisfy the objective component of the Eighth Amendment inquiry. Farmer, 511 U.S. at 834 (citations omitted). However, "[c]onditions, alone or in combination, that do not . . . fall below the contemporary standards of decency are not unconstitutional, and 'to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.'" Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986) (quoting Rhodes, 452 U.S. at 347).

As for the subjective component of the Eighth Amendment test, the Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge. Id. at 842-43. The officials can still show that they were unaware of the risk or that they were aware of the risk and took reasonable steps to prevent the risk of harm. Id. at 844-45.

It is undisputed that in the several days following August 10, 2003, plaintiff had

numerous encounters with jail staff, including medical personnel. In none of these encounters did plaintiff complain about his skin's reaction to Nair. Indeed, plaintiff has not submitted any evidence to prove that he suffered any negative consequence after using Nair on his face. Instead, it is undisputed that one day after plaintiff used Nair, plaintiff spoke to Deputy Bonkoski two times about using the law library. Bonkoski was able to clearly observe plaintiff's face during these conversations and did not observe any skin damage on plaintiff's face. Four days after plaintiff used Nair, plaintiff reported an injury to his hand from playing basketball to Deputy Rachel Ingalls but said nothing about an injury to his face from Nair. Eight days after August 10, 2003, nurse Laura Kennett saw plaintiff regarding plaintiff's request to discontinue a certain prescription medication and his complaints of arthritic knee pain and constipation. It is undisputed that at no time during the visit did plaintiff complain to Kennett of irritation or injury to his face from Nair and Kennett observed no injury of any type to plaintiff's face during the visit. Because plaintiff failed to put in any evidence to show that his use of Nair caused any injury, he cannot satisfy the objective component of the Eighth Amendment test.

Even if plaintiff had successfully introduced evidence of a sufficiently serious injury resulting from his use of Nair on August 10, 2003, plaintiff has adduced no evidence to prove that defendant was deliberately indifferent to the risk of injury. First, it is undisputed that defendant did not require inmates to remove their facial hair; it provided beard

trimmers to inmates preferring them. Moreover, it is undisputed that defendant provided inmates with Magic Shave and Nair on Sundays, Tuesdays and Thursdays before 10:00 a.m., with the provision that "Magic Shave and/or Nair ARE NOT to be used on your head . . . Magic Shave or Nair are used at your own risk." It is undisputed also that defendant had decided to allow inmates to use Nair to remove facial hair after jail staff found that male inmates had used Nair to remove facial hair in the past with success. Finally, it is undisputed that Captain Humphrey instructed jail staff to remind inmates each time an inmate requested to use Nair that the product was not intended for use on the face and that if an inmate chose to use it, the inmate would be responsible for the consequences.

Thus, although defendant was aware of the risk of allowing inmates to choose to use Nair on their face, defendant took reasonable steps to prevent the risk of harm by warning inmates of the risk and offering alternatives. No reasonable jury could infer that defendant acted with deliberate indifference to a serious risk of harm when it provided plaintiff with the choice to use Nair to remove facial hair.

## ORDER

IT IS ORDERED that

1. Defendant St. Croix County Administration's motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies is DENIED;

2. Defendant's motion for summary judgment on the merits of plaintiff Dane Marcus Bonner's Eighth Amendment claim is GRANTED;

3. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 18th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge